NO. A-740 (83-1526)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,

Appellants,

v.

GEORGE T. DAGGETT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

MOTION OF APPELLEES THOMAS H. KEAN, GOVERNOR OF THE STATE OF NEW JERSEY, AND JANE BURGIO, SECRETARY OF STATE, TO DISMISS OR AFFIRM

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Appellees, Thomas H. Kean, Governor of New Jerey, and Jane Burgio, Secretary of State
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-4965

MICHAEL R. COLE
First Assistant Attorney General
Counsel of Record

MICHAEL R. CLANCY
WILLIAM HARLA
Deputy Attorneys General
On the Brief

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

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Appellees, Governor of New Jersey and Secretary of State, respectfully move to dismiss this appeal or to affirm the judgment of the United States District Court for the District of New Jersey pursuant to Rule 16(1)(b) on the grounds that the appeal does not present a substantial federal question and, pursuant to Rule 16(1)(c) and (d), on the grounds that this appeal does not raise

any issues of special importance and that the judgment below is totally consistent with federal precedent and is so obviously correct as to warrant no further review by this Court.

Constitutional and Statutory Provisions Involved

This appeal involves Article 1, §2 of the United States Constitution, which provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and has been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years, in such Manner as they shall by Law direct. The Number of Representative shall not exceed one for every thirty Thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the

> State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.
>
> When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.
>
> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

This case also involves the prior New Jersey reapportionment statute, L. 1982, c. 1, commonly known as the Feldman Plan, which was previously held unconstitutional by this Court. That statute is set forth as an appendix to the District Court's original opinion. See *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 985-87 (D.N.J. 1982), aff'd —— U.S. ——, 103 S.Ct. 2653 (1983).

Counter-Statement of the Case

This is an appeal from a decision of a three-judge district court which ordered the implementation of a congressional redistricting plan for New Jersey following the failure of the State to enact a new redistricting plan in accordance with the population figures set forth in the 1980 census. The prior New Jersey reapportionment statute enacted following the census, L. 1982, c. 1, had been declared unconstitutional in an earlier decision of the three-judge court on the ground that, under *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), the range of population between the most and least populated districts of 3,674

people, or a relative overall range* of 0.6984%, violated the constitutional requirement of equality of population among districts. *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 985-87 (D.N.J. 1982). By order of Justice Brennen, the District Court's order was stayed and the 1982 congressional elections were held under the districts established by the existing New Jersey statute. In a decision rendered June 22, 1983, this Court affirmed the decision of the District Court that the redistricting plan "was not the product of a good-faith effort to achieve population equality," and concluded that the Feldman Plan was invalid since a lower population deviation could have been accomplished by selecting one of the alternative plans before the Legislature. *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653, 2663-65 (1983).

Pursuant to this Court's decision, on remand the District Court on December 19, 1983 entered an Order on Mandate declaring L. 1982, c. 1 unconstitutional and providing that, in the event that the Legislature and the Governor did not adopt a new congressional redistricting plan by February 3, 1984, the court would convene on February 7, 1984 to undertake further proceedings. Appellants' Appendix B at 31a to 32a.** The Court further ordered that witness lists be exchanged by January 31, 1984 and that those witnesses be held available for deposition from January 31, 1984 through February 6, 1984, *ibid.*, and

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* "Relative overall range" refers to the difference between the least and most populated districts expressed as a percentage of the ideal average district population. The ideal average district population is determined by dividing the population of the State according to the 1980 census by 14, the number of congressional districts to which it is entitled.

** As used herein, "Appellants' Appendix" refers to the Appendix filed by Appellants with their Jurisdictional Statement.

orally directed that any congressional redistricting plans proposed by the parties be submitted to the court by February 3, 1984.

When the New Jersey Legislature and Governor did not enact a new redistricting plan by February 3, 1984, the court held a hearing on February 7, 1984 to consider the plans submitted by the parties by the February 3, 1984 deadline. Among the plans presented, Appellees Forsythe, *et al.*, submitted a plan that had an overall deviation among districts of only 25 persons, for a relative overall range of 0.00475%. Opinion, Appellants' Appendix A at 12a. Appellants Alan J. Karcher, *et al.*, submitted two plans based upon L. 1982, c. 1, the statute previously declared unconstitutional by this Court, which slightly modified the earlier plan to obtain a lower population deviation among districts. The first plan, designated "Plan A," proposed the adoption of a bill introduced in the current session of the Legislature as Senate Bill 3564, which had a maximum deviation of 67 persons for a relative overall range of 0.01273%. The second plan, designated "Plan B," was a further modification of Plan A which divided a single municipality to accomplish a maximum deviation among districts of 42 persons.*

In an opinion and order issued on February 17, 1984, the District Court adopted the Forsythe Plan on the ground that, since it "achieves the lowest population devia-

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* Since appellants' Plan C was not presented to the court by the February 3, 1984 deadline, the court declined to consider it when it was presented for the first time at the February 7, 1984 hearing. The Plan C referred to in Appellants' Jurisdictional Statement is actually a modification of the Plan C the court declined to consider when presented on February 7. On February 16, 1984, Appellants advised the court that the earlier version of Plan C did not have completely contiguous districts and submitted the modified version.

tion of any plan which has been presented," it best fulfilled the constitutional requirement of attaining the lowest possible population deviation among districts. Opinion, Appellants' Appendix A at 12a. The court also concluded that the plan furthered the applicable non-constitutional criteria since it did not place any incumbents in the same district, preserved a Black majority in the Tenth District, was not designed to achieve partisan advantage and created compact districts. *Ibid.* In reaching this decision, the court determined that the two plans proposed by Appellants were an inappropriate basis for a remedy since those plans contained a greater population deviation than the Forsythe Plan, and established districts which were not compact and which had only a remote relationship to the districts established pursuant to the two prior decennial censuses. *Id.* at 7a to 8a. The District Court further concluded that the two plans were not entitled to deference under this Court's decision in *White* v. *Weiser*, 412 U.S. 783 (1973), because Appellants had not demonstrated that the Feldman Plan upon which they were based served any legitimate state policy objectives, and concluded that it was instead designed to serve "the patently discernable purpose of partisan advantage." Opinion, Appellants' Appendix A at 8a to 13a.

On March 2, 1984, Appellants Karcher, *et al.*, filed a Notice of Appeal to the Supreme Court of the United States and thereafter moved before the District Court for a stay of its February 17, 1984 order, and requested that the court summarily issue an injunction ordering the implementation of their Plan A or B for purposes of the 1984 New Jersey congressional elections. Appellants' application was denied by the three-judge panel by order filed March 14, 1984, and Appellants subsequently made the same application for stay and summary injunction to Associate Justice William Brennen, sitting as Circuit Jus-

tice. At the same time, Appellants filed their Jurisdictional Statement together with a motion for accelerated consideration of their appeal.

The request for the stay and injunction was referred to the full Court, and was denied by an order entered March 30, 1984. In addition, the motion for accelerated consideration of the appeal was denied by the Court by order entered April 2, 1984. Appellees Thomas H. Kean, Governor of New Jersey, and Jane Burgio, Secretary of State, now file this motion for dismissal of the appeal or, alternatively, summary affirmance of the decision below.

ARGUMENT

The decision of the District Court, which adopted the congressional redistricting plan submitted by Appellees Forsythe, *et al.*, and rejected Appellants' plans, should be affirmed since it is plainly correct or the present appeal should be dismissed because it fails to raise a substantial federal issue, does not present an issue of broad importance and the decision below does not conflict with federal precedent.

In this case, Appellants contend that the District Court failed to follow established precedent in ordering the implementation of the congressional districts proposed by the Forsythe Plan. Specifically, they allege that the court below was without discretion to choose any plan other than one based upon L. 1982, c. 1, the prior unconstitutional statute, so long as the population deviation in such plan was at a constitutionally acceptable level. See Jurisdictional Statement at 10 to 13. However, consideration of the prior decisions of this Court and the record below unequivocally demonstrate that this argument is without

basis in the law and that the District Court clearly did not abuse its discretion in failing to order implementation of one of the plans proposed by Appellants.

This Court has recognized that when a district court addresses the weighty but "unwelcomed obligation" of establishing congressional districts as a result of a state's failure to do so, the court is "faced with hard remedial problems in minimizing friction between [its] remedies and legitimate state policies." *Connor* v. *Finch,* 431 U.S. 407, 414-15 (1977). Moreover, since the primary authority for establishing congressional districting plans resides with the states, the District Court's sensitive endeavor "must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'" *Id.* at 415, quoting *Roman* v. *Sincock,* 377 U.S. 695, 710 (1964). This Court has further admonished District Courts to approach this task with an awarness that the ultimate objective of the redistricting process is to ensure the "full and effective participation in the political process" of "each and every citizen," since congressional representation pursuant to the plan the court adopts affects the essence of our system of self government. *Whitcomb* v. *Chavis,* 403 U.S. 124, 141 (1971), quoting *Reynolds* v. *Sims,* 377 U.S. 533, 565 (1964).

Moreover, this Court has consistently emphasized that a court-adopted reapportionment plan "will be held to stricter standards" than one adopted by a state legislature since a federal court is "lacking the political authoritativeness that the legislature can bring to the task." *Connor* v. *Finch, supra,* 431 U.S. at 414-15; accord *Wise* v. *Lipscomb,* 437 U.S. 535, 541 (1978). Accordingly, the court below was required not only to satisfy itself that the plan it adopted met the preeminent constitutional requirement of containing a constitutionally acceptable popula-

tion deviation among districts, *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2658, but also that the plan was "based on legitimate considerations incident to the effectuation of a rational state policy." *Connor* v. *Finch, supra,* 431 U.S. at 418, quoting *Reynolds* v. *Sims,* 377 U.S. 533, 579 (1964).

In this case, Appellants challenge the validity of the selection of the Forsythe Plan solely on the basis of their contention that the District Court was required to mechanically adopt one of their plans once it concluded that those proposals most nearly approximated L. 1982, c. 1, the prior legislation enactment. However, this contention ignores the fact that the lower court could reasonably have determined that it was precluded from adopting Appellants' Plan A or B since the Forsythe proposal more effectively remedied the constitutional violation which resulted in the invalidation of the prior plan.

In its earlier decision in this case, the Court reiterated that the requirement of "equal representation for equal numbers of people" implicit in Article I, §2 of the United States Constitution permits only those differences in the population of congressional districts which are "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown," and that there is no *de minimis* level of deviation from "[p]recise mathematical equality" which is constituionally permissible. *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2658-60, quoting *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 535 (1969). The only justification offered by Appellants for the level of population deviation contained in their plans was the desire to retain the shapes of the districts established by the earlier unconstitutional plan. Under this Court's prior decisions, the lower court could therefore defer to those plans only if the shapes of their districts, as originally embodied in the Feldman

Plan, furthered neutral state policy objectives sufficiently to justify the population deviation in Appellants' proposals as a "good-faith effort to achieve absolute equality. . . ." *Ibid.*

This analysis is also required under this Court's decision in *White* v. *Weiser, supra,* which held that consideration of a remedial reapportionment proposal based upon a prior statute must begin with consideration of the public policy objectives sought to be furthered by the earlier statute. In *Weiser,* the Court reviewed a determination of a three-judge panel which selected a particular congressional reapportionment plan "solely on the basis of population considerations," notwithstanding the fact that another proposal "achieved the goal of population equality to a greater extent" and "most clearly approximated the reapportionment plan of the state legislature." That plan had previously been declared unconstitutional on the basis of population deviations, and was specifically designed "to preserve the constituencies of congressional incumbents" and to avoid contests between them. 412 U.S. at 791, 796. Noting that the formulation of districts in a manner which minimized contests between incumbents was a valid state policy, 412 U.S. at 797, quoting *Burns* v. *Richardson,* 384 U.S. 73, 89 n.16 (1966), the Court held that "the District Court erred in so broadly brushing aside state apportionment policies without solid constitutional or equitable grounds for doing so." 412 U.S. at 797, quoting *Whitcomb* v. *Chavis,* 403 U.S. 124, 161 (1971). The Court accordingly concluded that the three-judge panel abused its discretion in failing to defer to the legitimate state legislative policy objectives reflected in the proposed plan, as a minor reformulation of the prior enactment, without specifically setting forth any "good reason[s]" for failing to do so. 412 U.S. at 796-97.

Thus, contrary to Appellants' contention, *White* v. *Weiser* does not mandate mechanical obeisance to the prior unconstitutional reapportionment statute but instead, as with the inquiry whether the population deviation figures contained in the proposed plans may be considered to be "justified," requires that the lower court focus its attention on the policy objectives sought to be furthered by the prior statute. Indeed, there is nothing in *Weiser* to suggest that the mere existence of a prior statutory plan creates, in effect, an irrebuttable presumption that it was intended to further valid state objectives. Such a wooden interpretation would be inconsistent with the broader principle of comity, of which the Court's decision in *Weiser* is but one expression, that it is only *valid* state policies which should be accorded deference whenever consistent with federal constitutional and statutory standards.

In applying this holding, the lower federal courts have therefore recognized that it is "only to the extent that the [proposed] plan *demonstrates* a legitimate state policy that it enjoys that privileged review which might have been presumptively accorded its predecessor," *Graves* v. *Barnes,* 446 F. Supp. 560, 564 (W.D. Tex. 1977), aff'd *sub nom. Briscoe* v. *Escalante,* 435 U.S. 901 (1978) (emphasis in original), and that the court may adopt a plan as a remedy only if the statute upon which it is based represents "a genuine effort, untainted by any suspect or invidious motives." *Doulin* v. *White,* 535 F. Supp. 450, 453 (E.D. Ark. 1982); accord *Terrazas* v. *Clements,* 537 F. Supp. 514, 528, 537 (W.D. Tex. 1982). Furthermore, the specific holding of *Weiser* that the lower court should have deferred to a plan based on statute designed to avoid contests between incumbents also required the District Court to decline to accord Appellants' proposals any special deference since, as discussed below, it was established that the Feldman Plan was deliberately crafted to

maximize the number of election contests between incumbent Republican congresspersons.

The standard articulated in *White* v. *Weiser* was not altered by this Court's *per curiam* decision in *Upham* v. *Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1982). Appellants rely on this case for the proposition that the plan adopted by the lower court could not depart from the prior unconstitutional reapportionment statute in the absence of a finding that other statutory or constitutional violations were implicated by the Feldman Plan. Jurisdictional Statement at 10. *Upham* involved a challenge to a congressional reapportionment statute under the Voting Rights Act ("VRA"), 42 U.S.C. §1973c, on the ground that it was legally unenforceable because the United States Attorney General had failed to certify compliance with the VRA as to two specific districts in the reapportionment plan. 456 U.S. at ——, 102 S.Ct. at 1519; *Seamon* v. *Upham*, 536 F. Supp. 931 (E.D. Tex. 1982), vacated and remanded 456 U.S. 37, 102 S.Ct. 1518 (1982). Since the VRA provides that the merits of an Attorney General objection may only be adjudicated in a declaratory judgment action in the United States District Court for the District of Columbia, prior decisions of this Court have held that the authority of district courts in other jurisdictions under the VRA is limited to determining whether the proposed change in election practices is covered by the statute and has been approved by the Attorney General, entering an injunction barring implementation of the practice if it has not been approved and, in reapportionment cases, providing for an interim redistricting plan. *Perkens* v. *Matthews*, 400 U.S. 379, 383-87 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 558-60 (1969).

The District Court in *Upham*, however, concluded that a failure to obtain "preclearance" as to the two districts rendered the entire plan a nullity, and therefore altered

the composition of districts not objected to by the Attorney General in formulating an interim reapportionment plan in order to render those districts more racially "fair." 456 U.S. at ——, 102 S.Ct. at 1519-20. In reversing the lower court's decision, this Court held that, in adopting an interim reapportionment plan to replace one rendered legally unenforceable as a result of an Attorney General objection to certain districts, the District Court could alter only the particular districts objected to by the Attorney General, absent a finding that composition of the remaining districts violated the VRA, the Constitution or relevant statutory provisions. 456 U.S. at ——, 102 at 1521-22.

Upham thus stands for a principle no broader than that an interim plan adopted by a District Court under the VRA may only reformulate those districts objected to by the Attorney General. This principle is consistent with the holdings of *Matthews* and *Allen* that, in essence, the District Court's jurisdiction in entering interim relief under the VRA extends no further than required to enforce the action of the Attorney General in failing to preclear the particular plan. See *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 942-43 (W.D. Miss. 1981), aff'd 456 U.S. 1002 (1982). Moreover, the District Courts which have applied *Seamon* have recognized its narrow application to the formulation of interim plans under the VRA, and have noted that the decision does not limit the District Court's authority to fully review constitutional and other public policy questions raised by the parties incident to the subsequent formulation of a final redistricting plan. See, *e.g.*, *Burton* v. *Hobbie*, 543 F. Supp. 235, 239 (M.D. La. 1982), aff'd —— U.S. ——, 103 S.Ct. 286 (1982).

The District Court in this case therefore properly turned to the policy objectives of the Feldman Plan, both to determine whether the level of population deviations con-

tained in Appellants' proposals could be justified as a "good-faith effort to achieve absolute population equality," and to determine whether the statutory genesis of those plans entitled them to any deference under this Court's holding in *White* v. *Weiser*. Appellants presented no evidence whatsoever to either explain or justify the policy objectives of the Feldman Plan, and instead relied solely on the fact that their present proposals were virtually a "mirror image" of the Feldman Plan. Moreover, substantial evidence was presented by the other parties to demonstrate that the Feldman Plan served no identifiable neutral state policy objectives, and that it was instead designed solely to achieve invidiously discriminatory political objectives. The District Court therefore properly concluded that Appellants had failed to meet their burden of proof, under *White* v. *Weiser* and the Court's prior decision in this case, of showing that their proposals were entitled to deference or that the population figures in those plans were justified. The District Court accordingly did not abuse its discretion when it instead adopted the Forsythe Plan, which had the lowest population deviation figures of any plan submitted by the parties.

Unrebutted evidence was offered by the other parties which established that the shapes of the districts established by the Feldman Plan did not correspond with any known communities of interest or represent any effort to follow geographical, social or political boundaries. See Exhibit D-13 in Evidence, Deposition of Assemblyman Richard A. Zimmer (February 4, 1984) (hereafter referred to as "Zimmer"), at T40-2 to -7; Exhibit IF-2(E) in Evidence, Public Meeting of the Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee on Congressional Redistricting (December 8, 1983), at 829 (Statement of Senator Gerald Cardinale). Indeed, it has been noted by a Justice of this Court that

the quality of representation under the Feldman districts would of necessity suffer, since "the boundaries are so artificial that they are likely to confound the congressmen themselves." *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2690 (Powell, J., dissenting). As a result, in the absence of other neutral public policies furthered by the Feldman Plan, the District Court could properly have concluded that the congressional districts which it established represent "little more than crazy quilts completely lacking in rationality [which] could be [rejected by the court] on that basis alone." *Reynolds* v. *Sims,* 377 U.S. 533, 568 (1964) (footnote omitted).

Furthermore, a comprehensive record was developed in the District Court which established the invidiously partisan and politically discriminatory purpose of the Feldman Plan as a whole.* The legislative history accepted into evidence amply demonstrated this harshly partisan animus. See Exhibit D-11 in Evidence. An unabashed and detailed expression of this legislative purpose was, of course, previously presented to this Court in the August 28, 1981 letter from then-Speaker of the Assembly

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*In light of the copious testimonial, demonstrative and statistical evidence, as well as legislative history, presented by the State, Appellees and other parties at the hearing below, Appellants' assertion that not "a single scrap" or "shred of evidence" was presented to demonstrate the gerrymandering purpose of the Feldman Plan (see Jurisdictional Statement at 17, 19) is both inexplicable and wholly without foundation in the record. Moreover Appellants' further assertion that the affidavit of Dr. Thomas Mann presented by them "was the *only* expert whose evidence was presented by *any* party on the question of gerrymandering" (see Jurisdictional Statement at 19 n.16) similarly misrepresents the record since the deposition of Richard A. Zimmer offered by the State Appellees was specifically accepted by the court—over the objection of Appellants —as expert testimony on this issue. See Hearing Transcript at 18 to 26.

Christopher J. Jackman to Ernest C. Reock, Jr. *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2677; see *Daggett* v. *Kimmelman, supra,* 535 F. Supp. at 989-93.

The effectuation of this intent with a vengeance was made clear to the District Court in the testimonial, statistical and demonstrative evidence presented by the parties. As set forth in the testimony of Assemblyman Zimmer, and as documented by the election data introduced into evidence, the Feldman Plan commenced its attempt to minimize or cancel the legitimate electoral strength of the Republican Party with the addition to the Ninth District, theretofore represented by a Republican incumbent, of strongly Democratic municipalities and the simultaneous elimination of Republican strongholds, which were shifted into the already overwhelmingly Republican Fifth District. Zimmer at T38-3 to -10. Simultaneously, the Feldman Fifth District, which provided a "dumping ground" for Republican votes from the old Ninth District, was artfully crafted to include the hometowns of two Republican incumbents, thus requiring that they either run against one another in the ensuing election, move, or run for election outside of their districts of residence. See L. 1982, c. 1; Exhibit D-4 in Evidence. The brazen lack of subtlety with which this was accomplished is clear from the 'artificial appendage' of the Fifth District, which swoops down (inside the 'neck' of the 'swan') to encompass the hometown of incumbent Republican Congressman James Courter. *Ibid.*; Zimmer at T30-7 to -16 & T77-18 to T78-7; see *Daggett* v. *Kimmelman, supra,* 535 F. Supp. at 984 (Gibbons, C.J., dissenting); *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2677 n.37 (Stevens, J., concurring); *id.,* —— U.S. at ——, 103 S.Ct. at 2690 (Powell, J., dissenting).

Although, of course, at least two incumbent congresspersons would be forced to reside in the same congres-

sional district as a result of the reduction of the State's congressional delegation, the proponents of the Feldman Plan were not satisfied simply with the result that both of the unlucky incumbent congresspersons be Republicans, but instead placed an additional two Republican incumbents in the new Twelfth District. See L. 1982, c.1; Exhibit D-4 in Evidence; Zimmer at T30-17 to T31-6; *Daggett* v. *Kimmelman, supra,* 535 F. Supp. at 984 (Gibbons, C.J., dissenting); *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2677 n.33 (Stevens, J., concurring); *id.*, —— U.S. at ——, 103 S.Ct. at 2690 (Powell, J., dissenting). For good measure, the Feldman Plan also placed the hometown of the Republican incumbent from the old Fourth District in a district held by a Democratic incumbent, thereby removing the Republican candidate from his demonstrated constituency base and precipitating a further contest between incumbents. Zimmer at T31-25 to T32-5. This premeditated paring of six incumbent congresspersons, five from one party, is, of course, directly contrary to the legitimate policy of formulating reapportionment plans to avoid unnecessary contests between incumbents. *White* v. *Weiser, supra,* 412 U.S. at 791; *Burns* v. *Richardson,* 384 U.S. 73, 89 n.16 (1966).

However, the surgical precision with which the Feldman Plan was partisanly drafted is most apparent in the new Third District. Recognizing that the Democratic incumbent in that district was clearly threatened by the aspirations of a particular Republican State Assemblywoman, over whom the incumbent had prevailed in 1980 by barely 2,000 votes out of more than 200,000 cast, see Exhibit D-2 in Evidence, the drafters of the Feldman Plan took a straightforward approach to neutralizing the Republican upstart: they simply deleted her State legislative district, previously totally encompassed by the Third District, practically *in toto* from the new Third District,

while at the same time transferring the Assemblywoman's hometown to the new Seventh District. Zimmer at T32-10 to -20; T37-6 to -19; T80-3 to -9; Exhibit D-12 in Evidence. The apparent motivating factor behind this maneuver was to insure that, in order to compete in the Third District, the Assemblywoman would have to run outside of her district of residence with virtually none of her constituency base—a set of circumstances which would be severely disabling in any election. Zimmer at T37-16 to T38-2.

What remained of the shredded remnants of the State was left with the dubious distinction of being designated the new Seventh District, otherwise known as 'the fish-hook.' See Zimmer at T30-4; *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2676 (Stevens, J., concurring), citing 40 *Cong. Q.* at 1194-95 (1982). Comprising, in part, municipalities from the old Twelfth District, the new Seventh District appears to have been intended to create another 'open' Democratic district out of one which might otherwise elect a member of the other party on the basis of the enormous personal appeal of the Republican incumbent from the old Twelfth District who previously represented the area, and whose hometown was placed in another district. Zimmer at T31-12 to -31.

Thus, there was a substantial evidentiary basis upon which the District Court could conclude that the Feldman Plan was consciously designed as an attempt to preserve existing strongly-Democratic districts and solidify that Party's more marginal districts, while either neutralizing Republican incumbents through displacement from their constituencies, or relegating them to political oblivion through the pairing of Republican incumbents in the new Fifth and Twelfth Districts.

Appellants allege that the District Court was required to conclude that the Feldman Plan was never-

theless "fair" because 13 of 14 incumbents ultimately prevailed in the ensuing election. However, there was ample evidence presented to the court below to demonstrate that this result must be attributed not to any neutral virtues intrinsic to the Feldman Plan, but to the single-minded resourcefulness of the hard-pressed Republican incumbents. Critical to the partial failure of the plan's gerrymandering purpose was the fact that the highly popular Republican incumbent from the old Twelfth District decided to run outside his district of residence in the 'fishhook' Seventh District, where he ultimately prevailed in the 1982 election, thus thwarting the attempted 'balkanization' of Republican electoral strength in the Central and Northern parts of the State. Zimmer at T79-3 to -9. When the other Republican incumbent who had been 'paired' in the new Twelfth District decided to run for the United States Senate, the Republican incumbent from the old Thirteenth District, who had been placed with another Republican incumbent in the new Fifth District, was free to move to the Twelfth District, where he subsequently won election, without the prospect of facing a Republican primary opponent. *Id.* at T78-18 to -21.

With the premise of the Feldman Plan's attempted gerrymander thus dislodged, the 'dominos' continued to fall in an unanticipated direction with the election of the sole Republican incumbent thus left in the Fifth District. Zimmer at T79-3 to -9. Moreover, the involuntary 'prodigal son' of the old Fourth District returned to his constituency to an electoral victory which must have similarly confounded the architects of the Feldman Plan. Although the Feldman Plan did successfully facilitate the vanquishment of the Republican incumbent in the Ninth District and the eclipse of the congressional aspirations of the previously-strong Republican candidate in the Third District, it is ironic that the thwarting of similar politically

invidious purposes directed at the other Republican incumbents should now be cited in support of the alleged "fairness" of that plan. The District Court therefore properly concluded that this fortuitous turn of events rendered meaningless any evaluation of the "fairness" of the Feldman Plan or its clones, Appellants' Plans A and B, on the basis of the results of the 1980 congressional election.

Similarly, there was sufficient evidence presented to rebut Appellants' contention that hypothetical election results projected on the basis of data from other unrelated state-wide contests proved the "fairness" of the Feldman Plan. As established by that evidence, the use of such data neither supports nor undercuts the purported fairness of a proposed congressional apportionment plan, since the actual results in such district-specific elections are in large part determined by the personal appeal of the candidates and the extent to which they enjoy an established constituency base—precisely the factors the Feldman Plan attempted to neutralize as to the Republican candidates. Zimmer at T74-6 to -25; T76-7 to -10; T83-21 to -25; T92-8 to -13. Use of such state-wide data further distorts any hypothetical results because they superimpose on the proposed congressional districts the major influence of candidate personalities evident in the elections from which the data are derived.* *Id.* at T87-18 to T88-2.

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* Even if it is assumed that a reliable evaluation of the "fairness" of the Feldman Plan may be made on the basis of these data, Appellants' characterization of those data overstates the hypothetical strength of the Republican Party by counting as a Republican "win" any district in which that Party has a hypothetical

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Since no other evidence whatsoever was presented to support the premise that the Feldman Plan furthered any neutral State policy objectives, the District Court therefore could have properly reached the conclusion that the districts which that plan established were "either totally irrational or entirely motivated by a desire to curtail the political strength of the affected political group." *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2675 (Stevens, J., concurring). Accordingly, under the prior decision of the Court in this case, the lower court properly concluded that the Feldman Plan, and derivatively Appellants' proposals, did not embody any legitimate state interests which would justify their choice over a plan which contained a lower population deviation among districts. The absence of such legitimate state policy objectives similarly compelled the lower court, under *White*

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plurality. However, it is recognized that districts in which a Party has a plurality of fewer than 55% should instead be characterized as "swing" districts. Zimmer at T46-10 to -20; *cf. Rybicki* v. *State Board of Elections,* 574 F. Supp. 1082, 1103 & n. 65 (N.D. Ill. 1982), supplemented 574 F. Supp. 1147 & 574 F. Supp. 1161. Indeed, consideration of all of the election data introduced in evidence which were aggregated on the Feldman Plan indicates that Appellants in fact rely solely on the three state-wide races which produce the largest number of hypothetical Republican "wins" under their extremely forgiving criteria of "victory." Moreover, data from the races not relied upon by Appellants result in the Democratic candidates prevailing over their Republican opponents in clear wins by a ratio of greater than two-to-one. Exhibit D-2 in Evidence; Appellants' Appendix E.

v. *Weiser*, to decline to accord Appellants' plans any special deference on the basis of their legislative genesis.*

It is therefore beyond reasonable dispute that the lower court did not abuse its discretion in thus selecting the Forsythe Plan, which contained the lowest population deviation figures of *any* plan which was timely proposed by the parties. Since Appellants have not otherwise challenged the reasonableness or validity of the Fortsythe Plan,** this Court should dismiss this appeal in light of the insubstantial federal question involved or, alternatively, summarily affirm the decision of the court below.

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* Contrary to Appellants' allegation, it is not significant that the harshly partisan purposes of the Feldman Plan might not warrant a finding of unconstitutionality if, as a legislatively adopted plan, it was challenged on this basis in the first instance. See Jurisdictional Statement at 12 to 13, citing *Simon* v. *Davis*, ——U.S. ——, 103 S.Ct. 3564 (1983). This is because, under *Karcher* v. *Daggett*, *White* v. *Weiser*, and *Connor* v. *Finch*, the District Court was required to consider those purposes not to decide the question of constitutionality, but instead to determine, respectively, whether the population deviation contained in Appellants' Plans should be considered justified, whether those plans were entitled to any deference as being based on the prior statutory plan, and whether those purposes satisfied the stricter standards applicable to court-imposed plans. See *Wise* v. *Lipscomb*, 437 U.S. 535, 540-41 (1978); *Dunnell* v. *Austin*, 344 F. Supp. 210, 215 (E.D. Mich. 1972).

** The only objection raised by Appellants is that approximately 31% of the State's citizens would be placed in districts different than those established for the 1982 congressional elections by the Feldman Plan. Jurisdictional Statement at 7. However, since this Court has noted that it is only "the maintenance of legislative districts long in effect" which is important when considering voter disruption, *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 201 (1972), there is no significant reason to calculate

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CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Appellees, Thomas H. Kean, Governor of New Jerey, and Jane Burgio, Secretary of State
By: MICHAEL R. COLE
First Assistant Attorney General
Counsel of Record

MICHAEL R. CLANCY
WILLIAM HARLA
Deputy Attorneys General
On the Brief

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(Footnote continued from preceding page)

such disruption on the basis of the Feldman Plan rather than the prior decade-old districts since "the [Feldman] districts are hardly venerable . . . or of pristine ancestry, being allegedly the product of a partisan gerrymander." *Dunnell* v. *Austin, supra,* 344 F. Supp. at 217. Indeed, it is ironic that voter disruption should now be urged in support of Appellants' plans, since it was precisely this purpose—*albeit* directed only at Republican candidates—which motivated the Feldman Plan upon which those proposals are based. In any event, it is recognized that the disruption of voters from prior districts is a factor which should only be considered after satisfaction of all other non-constitutional criteria. *LaCombe* v. *Growe,* 541 F. Supp. 160, 165 (D. Minn. 1982).